The Republic of Trinidad & Tobago

IN THE HIGH COURT OF JUSTICE

Claim No. CV: 2011-01234

IN THE MATTER OF COLONIAL LIFE INSURANCE COMPANY (TRINIDAD) LIMITED

And

IN THE MATTER OF THE INSURANCE ACT CHAPTER 84:01

BETWEEN

[1] PERCY FARRELL
[2] MARINA INALSINGH
[3] GORDON ROHLEHR
[4] DAVID DAYAL
[5] MICHAEL ALEXANDER

claimants

And

[1] COLONIAL LIFE INSURANCE COMPANY (TRINIDAD) LIMITED
[2] CENTRAL BANK OF TRINIDAD AND TOBAGO
[3] REPUBLIC BANK LIMITED
[4] WINSTON DOOKERAN, MINISTER OF FINANCE
[5] THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendants

APPEARANCES:

Claimant	Dr. Claude Denbow SC, Seenath Jairam SC, Dharmendra Punwassee, Rishi Dass instructed by Donna Denbow
4th & 5th Defendants	Allan Newman QC, Kelvin Ramkissoon instructed by Kerri Anne Olivierrie

DATE OF DELIVERY: 18th April, 2012

Before The Honourable Mr. Justice Devindra Rampersad

INTERIM COSTS RULING

Contents

1. The claimant filed an application for interim costs on 8 March 2012 as a further relief for advanced costs being sought and supplemental to the then pending application for pre-emptive costs. In their submissions of 09 March 2012 made in support of the application for interim costs, the claimant's attorney at law submitted that, by CPR Rule 17.1(1), the court may grant interim remedies including interim costs.

2. This court gave a written judgment in relation to the pre-emptive costs application on the 29th March 2012 and a history of the proceedings was given which need not be repeated here. The court will rely upon that history in this matter.

3. At issue, now, is whether an order for interim costs can be made against the fifth named defendant in favour of the claimant – Mr. Percy Farrell who was appointed on 29 July 2011 to represent the class of persons who hold EFPA policyholders and who have not accepted the Dookeran plan – as defined in this court's pre-emptive costs judgment.

The Sections of the Constitution allegedly being impinged

4. The claimants filed a re-amended statement of case on the 14th November 2011. In it, the claimants sough various constitutional reliefs against the 5th named defendant relative to the unconstitutionality of the

   4.1. The Central Bank (Amendment) Act No. 19 of 2011 ("the **CBAA**"); and

   4.2. The Purchase of Certain Rights and Validation Act No. 17 of 2011 of the laws of Trinidad and Tobago ("the **PCRVA**")

   Which were both passed on 20 September 2011, during the currency of these proceedings, and both of which, cumulatively, had a serious effect on these proceedings.

5. The re-amended pleadings for the claimants listed a number of ways in which the CBAA impinged the Constitution and set out in the following reliefs:

   "2. Against the Fifth defendant:

   A. DECLARATIONS:

(i) A declaration that the Central Bank (Amendment) Act 2011 ("CBAA") infringes upon and/or denies the Applicant (and all other persons within his class) the right to the enjoyment of property and the right not to be deprived thereof except by due process of law as guaranteed by section 4 (a) of the Constitution in a manner that is not reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual, contrary to **section 13 of the Constitution**.

(ii) A declaration that the CBAA infringes upon and/or denies the Applicant (and all other persons within his class) the right to equality before the law and the protection of the law as guaranteed by **section 4(b) of the Constitution** in a manner that is not reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual, contrary to **section 13 of the Constitution**.

(iii) A declaration that the CBAA infringes upon and/or denies the Applicant (and all other persons within his class) the right to a fair hearing as guaranteed by **section 5(e) of the Constitution** in a manner that is not reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual, contrary to **section 13 of the Constitution**.

(iv) A declaration that the CBAA infringes upon and /or denies the Applicant (and all other persons within his class) of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the rights and freedoms guaranteed under **section 4 and 5 of the Constitution** as guaranteed by **section 5 (2) (h) of the Constitution** in a manner that is not reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual contrary to **section 13 of the Constitution**.

(v) A declaration that the CBAA is unconstitutional on the ground that it contravenes the Separation of Powers Doctrine enshrined in or recognized by and is inconsistent with the very structure of, the Constitution by vesting the power to stay proceedings indefinitely in the Executive.

(vi) A declaration that the CBAA is unconstitutional on the ground that it diminishes the jurisdiction of the Supreme court and/or interferes with the supervisory jurisdiction of the Supreme court without having been passed in accordance with the procedure prescribed by section 54 of the Constitution.

(vii) A declaration that the CBAA is unconstitutional on the ground that it alters **sections 99 and/or 100 of the Constitution** without having been passed in accordance with the procedure prescribed by **section 54 of the Constitution**.

B.

(i) An Order that the trust fund established by Sec**tions 37 and 39 of the Insurance Act** in respect of CLICO's statutory fund obligations should not be dissipated and/or diminished to such an extent as to exclude the claimant and the class of EFPA policyholders who he represents from having their property rights as beneficiaries of the trust fund extinguished.

(ii) Further and in the alternative, an Order that the value of the assets placed by CLICO in the statutory fund created under **Sections 37 and 39 of the Insurance Act** not be dissipated and/or diminished with the result or to the extent that at any given time the value of the said statutory fund is less than the aggregate value of the interest therein of the claimant and the EFPA policyholders represented by the claimant.

C. All necessary directions and enquiries to give effect to the provisions of the Constitution and the orders sought herein.

D. Costs."

6. The claimant averred that the CBAA violated **Section 4 (a) of the Constitution** which guarantees the right of the individual to the enjoyment of property and not to be deprived thereof except by due process of law. The listed particulars of the contravention of the right not to be deprived of property except by Due Process of Law was as follows:

6.1. The CBAA deprives the claimant the right to pursue his claim for the protection of their beneficial interests in the Clico's Statutory Fund while the said fund is being exhausted at the direction of the CBTT[1], a Defendant to the proceedings;

6.2. The CBAA is a tool used by the Executive to permanently deprive the claimant of his status as a beneficiary of the assets held on trust in Clico's statutory fund; and

[1] The Central Bank of Trinidad and Tobago – the second named defendant

6.3. Such deprivations occurring:

6.3.1. Without providing an opportunity to persons affected to make representations;

6.3.2. Without the CBTT justifying the need for such a course before a Court of Law;

6.3.3. Without providing the claimants with an opportunity to invoke the Court's jurisdiction to supervise such deprivations;

6.3.4. At the direction of the CBTT during a stay which is imposed at the pleasure of the CBTT;

6.3.5. Without giving adequate compensation; and

6.3.6. Suspending the said rights at the pleasure of the CBTT, a Defendant to the proceedings, whose objective is to permanently deprive the claimants of their status as beneficiaries of the Trust.

7. The claimant further stated that, in his introduction of the CBAA into the House of Representatives on 14th February, 2011, the fourth named defendant admitted that the CBAA deliberately took away due process rights when he said:

> *"Mr. Speaker, this government has not entered into the decision to amend the Central Bank Act lightly. The inclusion of provision which will allow individuals to apply to the high court to set aside the stay has been considered as such provision to provide the necessary due process coverage that will obviate the need for a special majority. However, the inclusion of such protective provisions could effectively negate the usefulness of the stay of proceedings provision, as it will inevitably result in a multiplicity of applications before the court in order for the stay to be suspended.*

8. The claimant also averred that the CBAA contravened **section 4(b) of the Constitution** which guarantees the protection of the law and equality before the law. He listed the particulars of the contravention of Right to Equality before the Law as follows:

8.1. The CBAA vests in the CBTT, a Defendant to the proceedings, the power to stay the proceedings indefinitely;

8.2. The stay so imposed does not affect claims or counterclaims by the CBTT or the institutions in respect of which the stay operates, resulting in inequality of arms in the conduct of such litigation;

8.3. The CBAA vests the CBTT with the power to render the proceedings and any orders made therein nugatory by destroying the subject matter thereof; and

8.4. Allows other classes of policyholders of Clico to enjoy the protection of Clico's statutory fund while the rights of the claimant as a beneficiary thereof are systematically taken away by the Executive.

9. The claimant further averred that the CBAA violates **Section 4 (b) of the Constitution** which further guarantees the protection of the law. He listed the particulars of the contravention of Right to Protection of the Law as follows:

9.1. The CBAA allows the traditional policyholders to enjoy the protection of CLICO's statutory fund, while the applicant is being excluded therefrom when both classes of policyholders hold policies issued by Clico in respect of its long term insurance business and are equally entitled to be beneficiaries of the Trust created in respect of Clico's fund;

9.2. The CBAA suspends the right of access to the Court indefinitely at the pleasure of the CBTT while the CBTT implements its policy to permanently deprive the claimants of their rights as beneficiary of the assets held on trust in Clico's statutory fund;

9.3. The CBAA empowers the CBTT to render nugatory the prosecution of the pending proceedings and precluding judicial consideration of the merits of the claims made herein; and

9.4. The CBAA ousts the supervisory jurisdiction of the High Court over the CBTT in the exercise of its Special Emergency Powers and in particular over CBTT as it continues to implement the Dookeran Plan.

10. The claimants further averred that the CBAA violates:

10.1. **Section 5 (2)(e) of the Constitution** which provides that Parliament may not deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations by depriving the claimants of prosecuting their claim for the protection of the rights in the manner set out in paragraphs 48, 50, and 51 hereinabove.

10.2. **Section 5 (2) (h) of the Constitution** which provides that Parliament may not deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the rights and freedoms guaranteed under **section 4 and 5 of the Constitution**. The particulars of Non Justifiability were listed as follows:

10.2.1. The Supreme Court loses its jurisdiction over ongoing proceedings without the CBTT having to justify the need for a stay;

10.2.2. The CBAA ousts the Court's power of judicial review over the CBTT in the exercise of this draconian power;

10.2.3. The creditors of the institution are left without access to the Court to ensure that imposition of the stay and continuation thereof is justified;

10.2.4. The automatic moratoria arise instantaneously and apply to every single creditor of the institution;

10.2.5. The CBAA allows a Defendant to ongoing litigation, to which the Act is undoubtedly directed, to suspend proceedings indefinitely against itself;

10.2.6. The CBAA places the right of access to the Courts in the CBTT, a member of the Executive;

10.2.7. The legitimate aim of the CBAA and the means adopted to bring about the aim are not rationally connected as the CBAA is specifically aimed at creditors and strip creditors of all their rights without the protection of the Court. Such means will only serve to remove confidence in the financial system; and

11. In his address to the House of Representatives on September 14th 2011, the fourth named defendant, as recorded at page 5 of Hansard dated September 14th, 2011 sought to justify the passage of the CBAA by saying:

> *"Mr Speaker, I wish to emphasize at this stage, that the employment of a stay of proceedings in the circumstances where an institution is under the control of a national regulator, is not ground breaking in scope, but is one which has been utilized in many jurisdictions the world over. In New Zealand for instance, when a bank is under the statutory management of the reserved bank of New Zealand, there is an automatic stay of proceedings; a bar to enforcement of security agreements and a bar to levying distress. Similarly the Australian Banking Act 1959 provides for an automatic stay of proceedings when the Australian prudential regulation authority takes control over control of a bank. The position is much the same in Jamaica where the Minister of Finance may reconstruct a license and in that regard apply to the High Court for a stay of proceedings as well as in the United Kingdom and Singapore."*

12. The claimant claims that the foregoing statement is not accurate. Comparative legislation for the rescue of financial institutions throughout the Commonwealth does not impose automatic and indefinite stays at the pleasure of the executive without the possibility of judicial intervention. An application to the Court must be made to impose a moratorium and the applicant must justify the necessity of a stay and detail a plan for rescuing the institution. In New Zealand, while a stay on proceedings against banks under statutory management may indeed be automatic, the High Court may grant leave to any person wishing to bring or continue proceedings. This is also the case in Australia. The High Court therefore retains effective control over its processes. The CBAA cannot therefore be justified in the manner that the fourth named defendant sought to justify it.

13. The CBAA is merely another weapon in the arsenal of the fourth named defendant and the CBTT for discriminating against a particular class of beneficiaries. Such blatant discrimination and the use of the Parliament of the Republic of Trinidad and Tobago to

facilitate the same are wholly contrary to principle of equality and fairness and those provisions of the Constitution relied upon herein.

14. In any event, having regard to the widely disparate circumstances in which **s 44d** of the CBA may be invoked, and in any such case, the widely disparate categories of persons who may be affected, it is clear that any rational objective of the CBAA (which is denied) could be achieved by less restrictive and proportionate means.

15. The claimant further avers that the CBAA breaches the Separation of Powers doctrine and is unconstitutional. The listed particulars of the breach of the doctrine of the Separation of Powers are as follows:

    15.1. The power to stay proceedings falls exclusively within the purview of the Judiciary. The CBAA places this power in the hands of the Executive;

    15.2. The jurisdiction to lift a stay falls within the exclusive jurisdiction of the Court. The CBAA also places this power in the hands of the Executive;

    15.3. The CBAA allows the CBTT, being an arm of the Executive, to affect the outcome of judicial proceedings in which it is a party;

    15.4. The CBAA is an Act which prohibits the Supreme Court from hearing and completing pending proceedings indefinitely;

    15.5. The CBAA is undoubtedly ad hominem in nature, retroactive in effect, and is part of a common design against the EFPA policyholders. It severely affects, by way of restriction, the discretion or judgment of the judiciary in specific proceedings.

16. The claimant says further that the CBAA deprives the Supreme Court of its supervisory jurisdiction over the CBTT and of its jurisdiction over matters involving Clico and that such deprivation amounts to an alteration of **Sections 99 and 100 of the Constitution** within the meaning of **Section 54(6)**. The CBAA is therefore unconstitutional because it purports to alter **Sections 99 and/or 100** without complying with the procedure set out in **Section 54(4) of the Constitution**, which requires that the Act declare that it alters the **Constitution.**

17. Finally the claimant says that use of a 3/5 majority in the passage of the CBAA and compliance with the provisions of **Section 13 of the Constitution** cannot bring the CBAA into conformity with the Constitution as the **section 13** procedure merely cures inconsistencies with **Sections 4 and 5 of the Constitution** and not breaches of the separation of powers and/or the ousting of the jurisdiction of the Courts.

The Importance of the Constitution

18. The importance of the Constitution and in particular the right of persons to seek redress in violation of their constitutional rights has been highlighted and addressed throughout our High Court system at every level. The courts have placed supreme importance in guaranteeing that persons seeking redress under the Constitution are given an opportunity to be heard and for allegations of breach to be addressed. The supremacy of the Constituion and the fundamental rights and liberties it protects must, to my mind, be jealously guarded and protected. Allegations of its breach are not matters to be taken lightly and must be scrupulously examined to ensure that those rights and liberties enshrined in the Constitution are upheld to the full extent of the law thereby preserving the sanctity of the Constitution and the public confidence in its primacy.

19. In **Pinder v The Queen [2002] UKPC 46**, Lord Millett described the essential nature of a constitution and the role of the judges when interpreting it. He said:

> *"A constitution is an exercise in balancing the rights of the individual against the democratic rights of the majority. On the one hand, the fundamental rights and freedoms of the individual must be entrenched against future legislative action if they are to be properly protected; on the other hand, the powers of the legislature must not be unduly circumscribed if the democratic process is to be allowed its proper scope. The balance is drawn by the Constitution. The judicial task is to interpret the Constitution in order to determine where the balance is drawn; not to substitute the judges' views where it should be drawn."*

20. In **Subiah v the Attorney General of Trinidad and Tobago [2008] UKPC 47**, Lord Bingham of Cornhill in giving the judgment of the Privy Council said that:

> *"The Constitution is of (literally) fundamental importance in states such as Trinidad and Tobago and the Bahamas. Those who suffer violations of their constitutional*

rights may apply to the court for redress, the jurisdiction to grant which is an essential element in the protection intended to be afforded by the Constitution against the misuse of power by the state or its agents. Such redress may, in some cases, be afforded by public judicial recognition of the constitutional right and its violation."

21. In **Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 A.C. 328** Lord Nicholls of Birkhead stated that**:**

> *"Unlike the constitutions of some other Caribbean countries, the Constitution of Trinidad and Tobago contains no provision **precluding** the exercise by the court of its power to grant constitutional redress if satisfied that adequate means of legal redress are otherwise available… Nor does the Constitution of Trinidad and Tobago include an express provision **empowering** the court to decline to grant constitutional relief if so satisfied." [Emphasis mine]*

22. The Privy Council has thus repeatedly stressed the importance of the Constitution and the redress which may be sought. The claimant in the present case has claimed that his rights under the Constitution has been violated. The issue in these proceeings, therefore, is an important one for determination.

Interim Costs

23. In order to pursue the claim the claimant has applied to the court for interim costs.

24. Part 66 of the CPR deal with costs in general. "Costs" in Part 66.2(1) were defined as including attorney's charges and disbursements, fixed costs, prescribed costs, budgeted costs and assessed costs. Part 67 deals with the quantification of these costs. Neither Part deals with interim costs.

25. The CPR instead lists interim costs as an interim remedy under CPR Rule 17.1(1) without any descriptive discussion of its applicability and application.

26. The general rule in our jurisdiction is that costs follow the event and is determined at the end of the trial. Of that, there is no doubt.

27. The discretionary power to award interim costs in appropriate cases has been recognized in Canada in the celebrated case of ***British Columbia (Minister of Forests) v. Okanagan Indian Band*** [2003] 3 SCR 371. LeBel J said[2] that:

> *"The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid. Several conditions must be present for an interim costs order to be granted. The party seeking the order must be* ***impecunious*** *to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case; the claimant must establish a* ***prima facie case*** *of sufficient merit to warrant pursuit; and there must be* ***special circumstances*** *sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate." [Emphasis mine]*

28. It is obvious therefore that the principle of interim costs was developed to ensure access to legal redress in serious matters of public interest where impecuniosity may otherwise close the door to relief for a party with a "*prima facie case of sufficient merit*". As LeBel J said at paragraph 27 of ***Okanagan***:

> *"In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole."*

29. This tool, available though the CPR in Trinidad and Tobago, therefore allows this court to award to an impecunious party in certain special circumstances an advance on their costs prior to trial to be able to proceed with their case.

30. The Okanagan case outlined how and in what circumstances an award of interim costs may be granted in public law cases. It is stated in the headnote that:

> *"In public interest litigation special considerations also come into play. Public law cases, as a class, can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the special circumstances that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. It is for the trial court to determine in each instance whether a particular case, which might be classified as special by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs would be appropriate. The criteria that must be present to justify an award of interim costs in*

[2] Paragraph 36

this kind of case are as follows: the party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial; the claim to be adjudicated is prima facie meritorious; and the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases."

31. In public interest cases therefore the court is under a further obligation to ensure that the case that seeks to be adjudicated is of sufficient public interest that failure to award interim costs to an impecunious party would amount to an affront to justice.

The award of Interim Costs in countries with written Constitutions

32. Notably the case before the court is based on a constitutional issue as exists under the written Constitution of Trinidad and Tobago. It is therefore prudent to consider how and when the courts have awarded interim costs where a constitutional question has arisen.

33. It has been written that:

"However, few common law jurisdictions seem to have embraced interim costs awards, even in countries like the US where public interest litigation is common. In both India and South Africa, where public interest standing is applied very broadly, there appear to be no interim costs awards at the level of the highest courts. Nor are interim costs recognized by New Zealand law. Australian courts, by contrast, do recognize interim costs awards in situations similar to the classic Canadian (pre-Okanagan) model: in family law cases at common law and in common fund cases, such as bankruptcy, by statute."[3]

34. Attempts by this court to obtain comparable authorities other than from Canada on interim costs in the field of public law / constitutional law have indeed been unsuccessful in the Indian, South African and Australasian jurisdictions as well as in the Caribbean.

The Canadian position

35. In ***Okanagan***, the facts were as follows:

"In 1999, members of the four respondent Bands began logging on Crown land in B.C. without authorization under the Forest Practices Code of British Columbia Act. The Minister of Forests served the Bands with stop-work orders under the Code, and

[3] "***Access or Excess: Interim Costs in Okanagan"*** Gourlay, David; (2005) 63 U.T. Fac. L. Rev 111-143 at paragraph 52

commenced proceedings to enforce the orders. The Bands claimed that they had aboriginal title to the lands in question and were entitled to log them. They filed a notice of constitutional question challenging the Code as conflicting with their constitutionally protected aboriginal rights. The Minister then applied to have the proceedings remitted to the trial list instead of being dealt with in a summary manner. The Bands argued that the matter should not go to trial, because they lacked the financial resources to fund a protracted and expensive trial. In the alternative, they argued that the court, in the exercise of its powers to attach conditions to a discretionary order and to make orders as to costs, should order a trial only if it also ordered the Crown to pay their legal fees and disbursements in advance and in any event of the cause. The B.C. Supreme Court held that the case should be remitted to the trial list and declined to order the Minister to pay the Bands' costs in advance of the trial. The Court of Appeal allowed the Bands' appeal. The decision to remit the matter of the Bands' aboriginal rights or title to trial was upheld. The court concluded, however, that although the Bands did not have a constitutional right to legal fees funded by the provincial Crown the court did have a discretionary [page374] power to order interim costs. It ordered the Crown to pay such legal costs of the Bands as ordered by the chambers judge from time to time, subject to detailed terms that it imposed so as to encourage the parties to minimize unnecessary steps in the dispute and to resolve as many issues as possible by negotiation."[4]

36. A crucial factor in the case was as cited by Lebel J at paragraphs 4 and 5:

"The respondents filed affidavit and documentary evidence in support of their claims of aboriginal title and rights. They also submitted evidence demonstrating that it was impossible for them to fund the litigation themselves. ***The evidence indicated that the Bands were all in extremely difficult financial situations. The chiefs deposed that their communities face grave social problems, including high unemployment rates, lack of housing, inadequate infrastructure, and lack of access to education. Many members of the respondent Bands who live off-reserve would like to return to their communities, but are unable to do so because there are not enough jobs and homes even for those who live on the reserves now. The Bands have been forced to run deficits to finance their day-to-day operations. The chiefs of the Spallumcheen and Neskonlith Bands deposed that they are close to having outside management of their finances imposed by the Department of Indian and Northern Affairs because their working capital deficits are so high.***

5 The Bands' counsel estimated that the cost of a full trial would be $814,010. The Bands say that they had no way to raise this much money; and that even if they did, there are many more pressing needs which would have to take priority over funding litigation. One of the most urgent needs is new housing -- the very

[4] Taken from the case headnote

purpose for which, they say, they [page382] want to harvest timber from the land to which they claim title. *[Emphasis mine]*

37. The court in considering the issue of interim costs[5] outlined three criteria which must be present to justify the award of advance costs:

37.1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial – in short, the litigation would be unable to proceed if the order were not made (previously referred to in the Canadian jurisdiction as the "*but for*" test).

37.2. The claim to be adjudicated is prima facie meritorious; that is, the claim is of significant merit that is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

37.3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

38. The claimant in the case at bar submitted that each of the criteria set out in ***Okanagan*** was satisfied in the present case and listed the reasons for advancing such a notion.

39. Several other Canadian decisions also followed ***Okanagan*** such as:

39.1. ***Harpe v. Massie*** 2006 Carswell Yukon 46. This case involved interpretation of written constitution of Ta'an Kwäch'än First Nation and role of customs and traditions of elders in that interpretation particularly the fact that the Constitution did not contain specific provision setting out procedure for appointment of acting or deputy chief. Plaintiff applied for interim costs against Ta'an Kwäch'än Council but the Application was dismissed. The Court acknowledged that it had the discretionary power to award interim costs in special or extreme circumstances where party seeking interim costs genuinely cannot afford to pay for litigation, claim to be adjudicated is prima facie meritorious, and issues raised are of public importance and have not been resolved in previous cases. Still the court found

[5] "***The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid***." Per LeBel J at paragraph 35

that Although plaintiff met criteria and case was arguably of some public importance, issue ultimately affected internal operations of Ta'an Kwäch'än First Nation and did not meet requisite exceptional circumstances for order of interim costs. The court when comparing this case issue to the dispute in the Okanagan Indian Band case found that this issue was not of the same magnitude of public importance. The Okanagan Indian Band case dealt with the power to regulate the forest resource in British Columbia. It would have an impact on all citizens of British Columbia, whether aboriginal or non-aboriginal. In contrast, the issue in this case only affected the internal operations of this First Nation. "It may conceivably affect the constitutions of other First Nations but that is only a possibility and not a certainty. It does not affect non-aboriginals in the Yukon." The court therefore did not exercise its discretion in awarding Interim costs.

39.2. ***R. v. Fournier*** [2004] O.T.C. 260 in which the court awarded interim costs to impecunious parties on the basis that constitutional questions were novel and complex and of sufficient merit that it would be contrary to interests of justice not to provide funding.

The Australian position

40. In Australia, the ***Okanagan*** was cited with approval in several cases touching on public interest litigation in which the court had cause to consider the appropriate cost cap which was applicable to the particular case and it was plainly evident that courts in that jurisdiction seem reluctant to make an award of this nature unless there is an extreme public interest. The discretion is exercised under the court's consideration of Protective Costs orders.

40.1. In ***Corcoran v Virgin Blue Airlines Pty Ltd*** [2008] FCA 864, the Federal Court made the first protective costs order in a public interest case in more than 13 years. This case applied the Okanagan test in arriving at its decision to award the protective costs order. In that case the court noted that the general principle is that costs ordinarily follow the event and that a successful litigant receives costs in the absence of special circumstances justifying some other order (citing

Ruddock v Vadarlis (No 2) (2001) 115 FCR 229 at [11] per Black CJ and French J). The fact that litigation can be characterised as being "in the public interest" does not, of itself, mean that the usual order is not made. However, the nature and purpose of the proceedings are still relevant in the exercise of the discretion to award costs and the exercise of the discretion takes account of all of the circumstances. There is no error in taking into account in a decision whether to award costs matters such as the absence of personal gain on the part of the applicants, the fact that a significant number of members of the public may be affected and that the basis of the challenge is arguable and raises "significant issues" as to the interpretation and application of statutory provision.

40.2. In ***Blue Mountains Conservation Society v Delta Electricity*** [2009] NSWLEC 150, the NSW Land and Environment Court also made a protective cost order. The court found once again that costs are generally considered at the end of a hearing when the result is known and a decision can be made as to whether public interest considerations apply to any costs order. The court also acknowledged the ***Okanagan*** position and found that the governing principles relevant to the making of PCOs were (1) A PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing. (2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO. (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.

41. It is important to distinguish the Australian analysis of interim costs from our own. The Australian courts, while they have quoted with approval and applied the ***Okanagan***

decision, have considered it primarily in respect of capping of costs and have not focused on constitutional breaches - a significant point in the present litigation.

The Hong Kong position

42. In Hong Kong interim costs is also referred to as a protective costs order.

42.1. In ***Lai Pun Sung v The Director Of Agriculture, Fisheries And Conservation & Anor -*** [2009] HKCU 1296 the court refused to make an order for interim costs noting that the law on protective costs has not yet been developed:

> *"I am not going to say too much on the topic of protective cost order. I can see there is room for similar development in Hong Kong as in England on such kind of order. Having said that, of course one must also recognize that the development in England is still ongoing. I will leave that subject for debate in future cases."*

42.2. In ***Financial Services and Systems Ltd v Secretary for Justice*** [2007] HKEC 1507 the court found that it cannot be that every case involving constitutional arguments or matters of public importance will warrant a departure of the principle of costs to follow the event in civil litigation, including judicial review.

42.3. Unfortunately there seems to be very little case law available from Hong Kong on protective costs orders as they relate to the constitution and protecting the public interest.

The Caribbean position

43. In ***Grenada Electricity Services Ltd v Isaac Peters Grenada*** CA No 10 of 2002 the court found that where the process of assessment of a case is likely to be lengthy, in the interests of justice and in pursuance of the overriding objective an order for interim costs ought to be made even if the court was unable at the time to assess costs.

44. This was the only Caribbean authority this court was ale to find on the point and it was not helpful in determining the issue.

The award of interim Costs where there is no written Constitution

The United Kingdom position

45. The hallmark case for interim costs in the UK has been **R v Lord Chancellor, ex p Child Poverty Action Group.** This decision has been considered and applied in many UK decisions and has never been overturned. In that case the court found that the discretion to award such costs even in cases involving public interest challenges should be exercised only in the most exceptional circumstances. The principles to beapplied were identified as follows:

    45.1. That the issues raised were truly of general public importance;

    45.2. That the court had a sufficient appreciation of the merits of the claim that it could conclude that it was in the public interest to make the order;

    45.3. The financial resources of the parties;

    45.4. The amount of costs likely to be in issue (with the court more likely to make the order where the respondent had a superior capacity to bear the costs of the proceedings than the Applicant) and that unless the order was made the Applicant would probably discontinue the proceedings.

46. Dyson J at page 762 of the judgment, in providing an explanation of what is meant by a "public interest challenge" in relation to the application of the principle, stated:

> *"The essential characteristics of a public law challenge are that it raises public law issues which are of general importance,* ***where the applicant has no private interest in the outcome of the case.*** *It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own."*
>
> *[Emphasis mine]*

47. **In Proceedings by Campaign for Nuclear Disarmament [2002] All ER (D) 48 (Dec)** - this case applied *R v Lord Chancellor, ex p Child Poverty Action Group* [1998] 2

All ER 755 and found that a court could make a pre-emptive costs order in a public interest challenge case providing first the court was satisfied that the issues raised were truly ones of general importance. Secondly, that it had a sufficient appreciation of the merits of the claim that it could conclude that it was in the public interest to make the order. The court should also have regard to the need, so far as practicable to ensure that the parties were on an equal footing and that the case was dealt with in a way which was proportionate to the financial position of each party and whether the applicant would probably discontinue the proceedings would be acting reasonably in doing so. It was particularly appropriate to make an order in a case where the course which the court had ordered to be taken would secure its speedy determination.

The preferred position

48. The law regarding interim costs has certainly been under-developed and even in the countries with written Constitutions the courts seem reluctant to grant an award of such costs unless certain stringent criteria are met. Certainly it seems that the Canadian position has been best developed. While the Australian juridiction has also applied the Canadian position it has been applied only insofar as to determine whether costs should be capped. Therefore the Canadian courts remain the only courts that have analyzed interim costs in the context of constitutional breach and the only jurisdiction that has outlined certain criteria for the award of the same.

49. In addition to being the law best developed, it is applied in a country where there is a written Constitution. The claimants in our present case have claimed that their constitutional rights have been infringed upon. The rights as enshrined in the Constitution are sacrosanct and in all instances the court must seek to preserve the sanctity of the Constitution, religiously guarding it from breach. It is in these circumstances that the court favours the ***Okanagan*** position over that of the UK position as found in the **ex p Child Poverty Action Group** decision. The UK position does not, to my mind, adequately address the award of interim costs in a situation of constitutional breach because of their lack of a written Constitution.

50. What has been of particular concern to this court is the UK position that public interest litigation ought not to have a private interest element in it for it to successfully qualify for an advanced costs order. The difficulty this court has with that position in a jurisdiction such as ours where the rights of citizens are protected by the written Constitution is that a violation of a constitutional right may very well involve legitimate private financial interests which are entitled to be, and must be, protected under the Constitution. The ***Okanagan*** decision illustrates such a situation where the respective Indian Bands sought to protect their logging rights which involved a financial interest. A denial of a citizen's rights leading to financial adversity can still, to my mind, garner the protection of an advanced costs order notwithstanding the fact that a private interest is being protected once the stringent criteria are satisfied and once those private issues can be transcended by the public interest element.

51. Therefore this court prefers to apply the ***Okanagan*** decision in this case.

Okanagan applied

52. If this court must follow the Okanagan position it must find that the three criteria are met by the claimants:

    52.1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial – in short, the litigation would be unable to proceed if the order were not made.

    52.2. The claim to be adjudicated is prima facie meritorious; that is, the claim is of significant merit that is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

    52.3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

Is the claim prima facie meritorious?

53. There is no doubt in this court's mind that the claim to be adjudicated is prima facie meritorious. The issue of the claim is the constitutionality of certain legislation in Trinidad and Tobago and is of sufficient merit to ground this claim and to satisfy this criterion.

54. The removal of the right to access the courts is a very serious matter. It is one which ought not to be taken very lightly and, on the face of it, the removal of that judicial check and balance on the executive's action **may be** contrary to the rights enshrined in the Constitution. Of course, the fullness of time and the development of the arguments in support and in opposition would fully flesh out the issues for informed and considered deliberation by the court. Nevertheless, the court is of the view that the claim is a sufficiently meritorious one for the court to consider an interim costs order.

Does the issue transcend the individual interests of the particular litigant?

55. Mr. Percy Farrell on 31st May 2010 filed submissions to ground his application for a representative order. Mr. Farrell thereby made an application to represent the class of Executive Flexible Premium Annuity **("EFPA")** policy holders specifically all the EFPA policyholders who did not accept the 'Dookeran plan'. Therefore the claimant is representative of an entire class of persons and has not brought this claim in respect of himself thereby leading this court to conclude that the issue transcends the individual interests of Mr. Percy Farrell.

56. In addition since the advent of CLICO's demise there has been nationwide concern over the impact of this case. As the court has said before, the issue of the claim is the constitutionality of certain legislation in Trinidad and Tobago. In that regard the consideration of such a claim would have significant impact on the nation as a whole and, in particular, an important corollary would be the extent to which the executive can deny a citizen access to the courts. Indeed, to my mind, and in any event, the very manner in which the citizenry operates its business and conduct its affairs in investment

may be impacted by any consideration of this court in this matter. The case against the pieces of legislation in question strikes at the heart of the rights of the citizen to access to due process and to protect their rights through the legal system.

57. There is no doubt in this court's mind that this case far exceeds the individual interests of Mr. Percy Farrell and his class of policy holders and in fact impacts the nation as a whole.

Are the claimants impecunious?

58. The claimants have claimed that Mr. Percy Farrell is impecunious and therefore cannot afford the substantial cost to litigate this case. In the ***Okanagan*** case the court found "*the party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case*."

59. That case involved a destitute township of aboriginal peoples in Canada. The Indian Bands, as they are referred to, stated that they could not afford to litigate and even if they could, they would have preferred to use such funds to provide social services. They further claimed that they had been unable to find any governmental or *pro bono* sources of aid. For this reason they applied for an interim costs order. This took the Canadian Indian Bands populace outside of the norm as they sufficiently established their impecuniousity and dire position to the court which the court analyzed in great detail in its decision[6].

60. This court therefore must find that there is some similar or at the very least some significant situation of destitution whereby the claimant in this case cannot pursue litigation without the award of interim costs.

61. The claimant's submissions in this regard were as follows:

[6] See paragraph 36 above for a quotation on the Indian Bands' situation

"Inability to Pay

18. The first claimant Percy Farrell is 81 years of age. He cannot work and therefore derives his income from the monies earned on EFPA policies issued by CLICO. All of the other claimants are similarly circumstanced. They are unable to pay legal fees.

*19. The action herein was commenced by the claimants prior to the passage of the CBAA and was so commenced on the understanding and belief that the costs of the litigation would be funded out of the statutory trust. Even at that time, the claimants were unable to afford the legal costs of pursuing these proceedings. (**See paragraphs 28-30 of the affidavit of Percy Farrell dated and filed on 5th April 2011 and paragraph 5 of the affidavits of the other four claimants sworn to and filed on the same date**).*

20. At that stage it was never imagined that the claimants would be constrained to make constitutional challenges to legislation which sought to prevent their access to Court while GORTT proceeded to push the policyholders into accepting the Dookeran Plan. This unforeseen expense is the result of State action and the claimants cannot afford to fund the constitutional challenge.

*21. It is highly likely that if an order for the PEC or an order for interim costs to fund the constitutional challenge is not made, the claimants will be unable to proceed with their claim (**see the further supplemental affidavit of Percy Farrell sworn to and filed on 9th March,2012**). It is contrary to the interest of justice that claimants who have initiated bona fide meritorious claims be denied justice because of a lack of funding. The claimants' monies are tied up in Clico. It is therefore unfair and unjust for the claimants meritorious claim to be stifled by lack of funding. This Court should therefore set its face against this possibility and make an award that is not only right but just as well."*

62. Mr. Farrell has buttressed his application for interim costs by claiming that he is impecunious and cannot afford the cost of litigation. The other claimants have so too claimed. However, Mr. Farrell made an application to represent the EFPA policyholders. This was a task that he took upon himself. While the court is not disputing that Mr. Farrell may be impecunious, this court cannot say that the entire class that he represents are in the same position and that no other option and is open to them to carry out this litigation. Mr. Farrell's deposition that, but for an order for interim costs, he would not be able to carry on the litigation, does not answer the question as to whether the class which he represents, as a whole, is in a similar predicament. Because Mr. Farrell cannot afford the costs of this claim does not mean that all the EFPA policyholders he represents are in the same position. Should the court then award

interim costs because the claimant who chose to represent the class of persons cannot afford litigation? Or must the court look at the class as a whole to determine whether the entire class is so financially strained that without this award this legal question would never be determined?

63. The ***Okanagan*** case focused on an entire class of persons who could not afford to continue their claim without an interim costs award. Their situation was a shockingly stark story of squalor which summoned the sympathy of the court sufficiently enough, when seen as as a whole community, to warrant the consideration afforded to them by the majority of the Canadian Supreme Court. The claimant, to my mind, has failed to prove that a similar situation exists in this case. Certainly, it is not fair to say that because a man of straw may have been chosen to represent a class of persons it necessarily means that the class that he represents is of similar means. To do so would be, to my mind, to open up the principle to abuse. It would be strategically desirable, for example, for a class which can afford litigation to appoint a person who cannot so afford in order to represent it and then rely upon that person's impecuniousity to obtain funding for the litigation from the defendant. That does not seem fair and it cannot be the intention of the principle. To my mind, the principle seeks to open the doors to litigation in public interest matters to those who cannot afford it but it is incumbent upon those who come before the court, whether in their own right or as representatives of a large class, to satisfy the court on a balance of probabilities that the class, as a whole, cannot carry on the litigation but for the intervention of the court through an interim costs order. The court does not have that evidence and the sheer poverty and dire need exhibited in ***Okanagan*** cannot be found in this case.

64. The court therefore cannot find that impecuniousity was proven to afford the claimant the relief of an interim costs order.

The order

65. In the circumstances, the court is not minded to make the order being sought by the claimant for interim costs and, therefore, the notice of application filed on 8 March 2012 is dismissed.

66. The claimant shall pay the fifth named defendant's costs of this application to be assessed pursuant to part 67.11 of the CPR.

67. Leave is granted to the claimant to appeal this decision.

68. The assessment of the costs is stayed pending the outcome of the appeal.

69. Upon the request of the attorneys at law for the claimant and in light of the two (2) dismissed applications for costs, that is the pre-emptive costs application and the interim costs application, the trial dates fixed for 26th and 27th April 2012 are vacated;

70. All further proceedings and application including the assessment of the costs of the pre-emptive costs application and any other pending assessment of costs are stayed pending the outcome of the appeal

71. A further case management conference in this matter is to be held at a date to be fixed after 14 May 2012 after consultation with the parties

DEVINDRA RAMPERSAD J
HIGH COURT JUDGE

Assisted by:
Krystal Richardson,
Attorney at Law
Judicial Research Assistant